

Removal of the President

5.1 Proposed s.62 provides for the removal of the President, as follows:

62 Removal of President

The Prime Minister may, by instrument signed by the Prime Minister, remove the President with effect immediately.

A Prime Minister who removes a President must seek the approval of the House of Representatives for the removal of the President within thirty days after the removal, unless:

- (i) within that period, the House expires or is dissolved; or
- (ii) before the removal, the House had expired or been dissolved, but a general election of members of the House had not taken place.

The failure of the House of Representatives to approve the removal of the President does not operate to reinstate the President who was removed.

5.2 This provision gives effect to the recommendations of the Constitutional Convention dealing with the removal of the President. Specifically, the Convention recommended:

The President may be removed at any time by a notice in writing signed by the Prime Minister. The President is removed immediately the Prime Minister's written notice is issued. The Prime Minister's action must be presented to a meeting of the House of Representatives for the purpose of its ratification within 30 days of the date of removal of the President. In the event the House of Representative does not ratify the Prime Minister's action, the President would not be restored to office, but would be eligible for re-appointment. The vote of the House would constitute a vote of no confidence in the Prime Minister. ¹

5.3 Proposed s.62 was the focus of much discussion in both submissions to the Committee and in hearings before the Committee. In broad terms, the major concerns with the dismissal procedure related to:

- whether too much power would be vested in the Prime Minister, and whether, in practical terms, the procedure that proposed s.62 would establish differs in any significant degree from the dismissal procedure presently applying to the Governor-General;
- whether other procedures should be built into the dismissal process;
- the omission from proposed s.62 of the Constitutional Convention's recommendation that a failure by the House of Representatives to ratify a Prime Minister's dismissal of the President would constitute a vote of no confidence in the Prime Minister;
- the exception to the Prime Minister's obligation to seek ratification by the House of Representatives in the event of the House being dissolved or expired; and
- whether a completely different dismissal procedure from that recommended by the Constitutional Convention would be more appropriate.

¹ See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraph 25.

Dismissal of the President compared with dismissal of the Governor-General

- 5.4 Under proposed s.62, the Prime Minister has a broad discretion to remove the President from office. This aspect of proposed s.62 accords with the Convention's recommended Model.
- 5.5 At present, the Governor-General holds office during the Queen's pleasure under s.2 of the Constitution, which provides:
2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.
- 5.6 The Governor-General is, therefore, subject to dismissal by the Queen at any time. Furthermore, the Constitution specifies no grounds for the removal of a Governor-General, and requires no subsequent procedures, such as ratification by Parliament, or an opportunity for the Governor-General to state a case publicly.
- 5.7 Although a Governor-General would actually be dismissed by the Queen, the conventions and principles of responsible government dictate that she must act on the advice of the Prime Minister. The Queen is obliged, ultimately, to accept the advice of the Prime Minister. If she did not, she would be acting unconstitutionally.² No Governor-General has ever been dismissed.
- 5.8 Proposed s.62 specifies that the Prime Minister's removal of a President would be effected by signed instrument, 'with effect immediately'. This aspect of the dismissal procedure attracted considerable debate. A number of witnesses before the Committee expressed the view that an instantly effective dismissal would considerably alter the present position in relation to removal of a Governor-General, because the protection presently enjoyed by the Governor-General resulting from the necessary practical delay involved in communicating with the Queen, and the time differences between Australia and the United Kingdom, would disappear. Professor Leslie Zines remarked:

2 Mr Dennis Rose AM QC, *Transcript*, p. 25; Professor Greg Craven, *Transcript*, p. 313.

The explanatory memorandum says that this method is similar to the present one. I think that is very deceiving. The present system does not allow the Prime Minister to get rid of the Governor-General simply by directing that that should be so in writing, and the Queen has those rights to be consulted, to warn, to encourage, and that takes time. Time could very well be of the essence if you have a situation of constitutional high noon when you are wondering who is going to shoot first.³

5.9 Some witnesses felt that the omission of a similar delay would alter the balance of the present system between the Governor-General and the Prime Minister.⁴ Hence, many suggested that a delay should be built into the dismissal procedure provided for in proposed s.62.⁵

5.10 However, other witnesses expressed the view that, given the speed of electronic communications at the end of the twentieth century, with e-mail and facsimile machines, there is little difference between the instant dismissal provided for by proposed s.62 and the present position regarding dismissal of the Governor-General. Mr Dennis Rose AM QC commented:

I do not really see any problem in the provision for instant dismissal by the Prime Minister by an instrument in writing. At the moment the Prime Minister can have the Governor-General dismissed by contacting the Queen. The only thing that stands in the way of immediate action by the Queen is whatever might be happening over there in the confines of Buckingham Palace ... [T]he Queen should act immediately upon the advice of the Prime Minister, just as quickly as it can be got to her. So, in practice, there would be no difference between what ought to happen now and what is provided here, that is, instant dismissal by the Prime Minister.⁶

3 Professor Leslie Zines, *Transcript*, p. 24; *Submissions*, p. S701.

4 Dr Gavan Griffith QC, *Submissions*, p. S395; The Rt Hon Sir Zelman Cowen, *Transcript*, pp. 210, 212; Professor Brian Galligan, *Transcript*, p. 202.

5 The Hon Malcolm McLelland QC, *Submissions*, p. S627; Law Society of New South Wales, *Submissions*, p. S506.

6 Mr Dennis Rose AM QC, *Transcript*, pp. 24–25.

- 5.11 Other witnesses felt that the procedure set out for dismissal of the President in proposed s.62, while essentially mirroring the present situation, actually “improves upon the current position because it ensures that the House of Representatives considers the presidential removal”.⁷
- 5.12 Many witnesses indicated a preference for instant dismissal. The Rt Hon Malcolm Fraser commented that the possibility of delay in the present system, if a reality, was in fact undesirable, as it could result in an interregnum because the Governor-General could not legitimately exercise any powers at a time when the Prime Minister had sought his dismissal.⁸ Further, Mr Fraser felt that:

Having regard to the powers that the Governor-General technically has, in reading the Constitution, the only thing that civilises those powers and makes them acceptable in a democracy is the capacity to be instantly dismissed.⁹

- 5.13 Associate Professor Peter Howell expressed similar sentiments, as did Dr Baden Teague.¹⁰ Professor Greg Craven remarked that:

the point upon which the whole system pivots is the fact that the Prime Minister may remove the Governor-General. The Governor-General may not effectively exercise power contrary to our wider constitutional system, because he or she knows that he or she is easily or automatically removed by the Prime Minister. ... I am totally relaxed about what some people call ‘constitutional chicken’—the mutual dismissibility of the head of state or head of government ... That is what is called a balance of powers in the text books. It is a very good thing.¹¹

7 Professor George Winterton, *Transcript*, p. 100. See also Mr Timothy Stanley, *Transcript*, pp. 292–293; Dr Ralph Chapman, *Transcript*, p. 397; The Hon Michael Lavarch, *Transcript*, p. 535; Professor Cheryl Saunders, *Transcript*, p. 722.

8 The Rt Hon Malcolm Fraser, *Transcript*, p. 219. Professor Brian Costar indicated agreement with these views, *Submissions*, p. S579.

9 The Rt Hon Malcolm Fraser, *Transcript*, p. 219. See also Dr Ralph Chapman, *Transcript*, p. 395.

10 Associate Professor Peter Howell, *Transcript*, p. 241; Dr Baden Teague, *Transcript*, p. 284.

11 Professor Greg Craven, *Transcript*, pp. 312, 314.

- 5.14 The Committee acknowledges that it may be true that under the present system for dismissing a Governor-General, there may be some delay between the Prime Minister communicating the request for dismissal to the Queen, and the Queen acting upon it, and that proposed s.62 does not replicate a similar delay. However, given the speed of modern communications, it is unlikely that this delay would be of great significance. In any event, as the present system for dismissing a Governor-General has never been tested, it is not clear what benefit, if any, such a delay would ultimately have. It was argued that it may simply give the Governor-General an opportunity to dismiss the Prime Minister.¹² Alternatively, it was argued that it would result in an undesirable interregnum during which neither the Governor-General nor the Prime Minister could be confident that they could legitimately exercise their respective powers.¹³
- 5.15 The Committee considers that the proposed dismissal procedure would not bring about significant, or undesirable, change to the present arrangements for removal of the Governor-General, and that any deficiency identifiable in the procedure set out in proposed s.62 is equally a deficiency of the present system. The Committee does not therefore agree that a delay or ‘cooling-off’ period should be incorporated into proposed s.62.
- 5.16 In addition, the Committee notes that the proposed model, while effecting instant dismissal, imposes a form of accountability upon a Prime Minister who dismisses a President to which a Prime Minister who dismisses a Governor-General is not presently subject, that being the obligation upon the Prime Minister in proposed s.62 to bring the matter before the House of Representatives within 30 days of the dismissal.
- 5.17 A number of witnesses, some generally supportive of the Convention’s dismissal model, suggested that additional procedures should be built in to the dismissal procedure set out in proposed s.62. Some recommended that the Prime Minister should be required to table or publicise a statement of his or her reasons for dismissing a President.¹⁴ Another suggestion was to give the President an opportunity to address the House of Representatives prior to the House voting on the Prime Minister’s dismissal of the President.¹⁵

12 See the comment of Mr Dennis Rose AM QC, *Transcript*, p. 27.

13 Rt Hon Malcolm Fraser, *Transcript*, pp. 219–220.

14 Dr John Uhr, *Transcript*, p. 26. See also Professor George Winterton, *Transcript*, p. 103.

15 Law Society of New South Wales, *Submissions*, p. S508.

- 5.18 It was also argued that the period of thirty days allowed in proposed s.62 for the Prime Minister to seek the approval of the House of Representatives was too long.¹⁶ The Committee would expect that the Prime Minister would make a statement immediately. However, the Committee considers that it would be unwise to prescribe a shorter period than thirty days, as this may cause difficulty if the House had risen and had to be recalled. The Committee considers that this concern would be addressed if the Prime Minister were obliged to bring the matter before the House as soon as practicable, but in any event within 30 days of the dismissal.

Recommendation 11

- 5.19 **The Committee recommends that consideration be given to amending the Republic Bill so that if the Prime Minister has dismissed the President, the Prime Minister must seek the approval of the House of Representatives as soon as practicable after the removal, but in any event within thirty days of the dismissal.**
- 5.20 The questions of whether the dismissal of a President would be justiciable, and specifically whether a duty to accord natural justice would be implied into the Prime Minister's power to dismiss the President, caused some debate before the Committee. While a power of dismissal in a normal statute would almost certainly attract such a duty, the highly political nature of the dismissal of a President may be a factor going against the implication of this requirement. Various witnesses felt confident that the dismissal of a President would be unlikely to be seen as justiciable by the High Court,¹⁷ although others suggested that the Republic Bill should specifically rule out the possibility of judicial intervention in the dismissal of a President.¹⁸

16 Senator Jan McLucas, *Transcript*, p. 471.

17 Ms Linda Kirk, *Transcript*, p. 261; Dr Baden Teague, *Transcript*, p. 283.

18 Professor Leslie Zines, *Transcript*, p. 24.

- 5.21 The Committee considers that the inclusion of an express right for the President to address the House of Representatives would be superfluous. The House has the power to determine its own procedure, and could therefore extend to a dismissed President an opportunity to address the House. Moreover, such an express right is not warranted by the recommendations of the Constitutional Convention. Similarly, the Committee considers that the imposition of a duty on the Prime Minister to issue a statement of reasons for the dismissal is also superfluous, as the political reality would be that the Prime Minister would certainly make a public statement very soon after dismissing the President to explain his or her actions.
- 5.22 Furthermore, the Committee does not consider that the Republic Bill should attempt to generally quarantine the power of dismissal of a President from judicial review, or exclude from this power the obligation to observe procedural fairness. The Committee considers that these matters are most appropriately determined by normal legal processes as they develop over time.

Consequence of the House of Representatives failing to ratify a dismissal

- 5.23 As noted above, the Constitutional Convention recommended that where a Prime Minister dismisses the President, the Prime Minister should be required to seek the House of Representatives' approval of the dismissal within thirty days. Further, the Constitutional Convention recommended that if the House failed to ratify the dismissal, the vote of the House would be a vote of no confidence in the Prime Minister.
- 5.24 The draft legislation has not given effect to the Constitutional Convention's recommendation that a failure by the House to ratify a dismissal should constitute a vote of no confidence. The Referendum Taskforce gave the following explanation of the Republic Bill's departure from the Convention Model:

It is highly unusual to have a vote of no confidence in a single Minister, particularly the Prime Minister, and it is not entirely clear what the Convention envisaged would be the implication of such a vote. One interpretation may be that it would amount to a vote of no confidence in the government, possibly leading to an election. Another is that it would be treated as applying only to the Prime Minister, in which case the Prime Minister might have to resign but another member of the government party might take over as Prime Minister.

The proposed provision does not spell out what the implications of failure to obtain approval would be. This reflects the Government's view that the matter should be left for the political process to resolve in any particular case. The requirement to seek approval provides a clear basis for consideration by the House of the merits of the dismissal. In the absence of majority support for the dismissal, some form of no confidence motion would seem almost inevitable. It is unnecessary to attempt to codify that outcome and its consequences. Any such provision could operate inappropriately in particular circumstances.¹⁹

- 5.25 Officers of the Referendum Taskforce expressed the view that it would be "technically inadequate" to provide simply that the House's failure would amount to a vote of no confidence in the Prime Minister. They stated that it would be necessary to spell out the consequences of the vote of no confidence, which in turn would require complex provisions to take account of complex factual situations. It was also pointed out that to include such a provision would go beyond the Constitutional Convention's Model.²⁰
- 5.26 A number of commentators on the draft legislation were critical of this omission.²¹ Dr John Hirst described the omission as 'a highly significant departure from the Convention's recommendations' because:

The Convention balanced the power of a Prime Minister to dismiss a President with the sanction of no-confidence in the Prime Minister if the Prime Minister failed to gain the approval of the House of Representatives for a dismissal. The drafts people, uncertain of what no-confidence would mean, have simply omitted this part of the provision. They have thus destroyed the balance which the Convention wanted to preserve in the dismissal procedure. If they cannot provide the Convention's sanction on the Prime Minister, they should provide for an alternative balance to the Prime Minister's power.²²

19 Referendum Taskforce, *Submissions*, p. S94.

20 Mr Jim Faulkner, *Transcript*, p. 11.

21 Mr Michael Stokes, *Transcript*, p. 421, *Submissions*, p. S623; Dr Richard Herr, *Transcript*, p. 431; Senator Jan McLucas, *Transcript*, p. 470.

22 Dr John Hirst, *Submissions*, p. S283.

- 5.27 However, other witnesses agreed that it would be appropriate to leave the consequences of a Prime Minister not being able to secure the approval of the House for his or her dismissal of a President to the operation of the political processes.²³ The Hon Michael Lavarch remarked:
- The way the real system works in Australia is that a Prime Minister who was voted down after dismissing a President ... would be obliged to resign. That is the reality of the tensions in our system.²⁴
- 5.28 Professor Greg Craven agreed, stating that “[a]t the end of the day... the removal of a President is always going to be a fundamental matter of confidence”.²⁵ Similarly, Mr Dennis Rose AM QC and Professor Leslie Zines were of the view that the Republic Bill should not specify the consequences of a failure of the House to ratify a dismissal.²⁶ Professor Zines considered that it would be inappropriate for a law, particularly the Constitution, to specify the effects of parliamentary deliberations, and that it should be left to the House itself to determine the sanction if it disapproved of the dismissal.²⁷
- 5.29 While Professor Cheryl Saunders saw some ‘cosmetic’ value in specifying that the failure of the House of Representatives to ratify the dismissal would amount to a vote of no confidence, she agreed that it would be inappropriate for the implications of the vote of no confidence to be spelled out.²⁸
- 5.30 Opinions differed about what the consequence of a no confidence vote in such circumstances would actually be, and thus how they should be expressed in the Constitution, if an attempt were made to specify the effects of the House failing to ratify a dismissal. Mr John Pyke expressed the view that a vote of no confidence in a Minister does not automatically require the Minister’s resignation.²⁹ Professor George Winterton felt that a vote of no confidence would mean “that the House should be dissolved and there should be a general election to allow the people to judge”.³⁰ On the other hand, the Hon Malcolm McLelland QC expressed the view that:

23 For example, Mr Stuart Hamilton, *Submissions*, p. S307; Associate Professor Peter Howell, *Transcript*, p. 235; Dr Baden Teague, *Transcript*, p. 282.

24 The Hon Michael Lavarch, *Transcript*, p. 534.

25 Professor Greg Craven, *Transcript*, p. 300. See also *Transcript*, p. 306.

26 Mr Dennis Rose QC AM, *Transcript*, p. 703; Professor Leslie Zines, *Transcript*, p. 703.

27 Professor Leslie Zines, *Transcript*, p. 703.

28 Professor Cheryl Saunders, *Transcript*, p. 703.

29 Mr John Pyke, *Transcript*, p. 540.

30 Professor George Winterton, *Transcript*, p. 101.

There should be a distinct and substantial sanction, commensurate with the seriousness of the event, and since it would involve the inability of a Prime Minister to gain the support of the House in a matter of such importance as removal of the President, an appropriate sanction would involve the Prime Minister's removal from office and being ineligible for reappointment until after a general election.³¹

- 5.31 The Committee notes that history has demonstrated that a defeat of the Government in the House does not necessarily mean it has lost the confidence of the House or that it ought to resign.³² The Committee considers that the failure of a House to approve a Prime Minister's removal of a President would create a serious difficulty for an individual Prime Minister. The Committee concludes that ultimately the appropriate sanction for a dismissal of the President by a Prime Minister, which is unacceptable to a House of Representatives, would be something most appropriately determined by the electoral process in each particular case.

No ratification required if Parliament has been dissolved

- 5.32 The second paragraph of proposed s.62 provides an exception to the general obligation upon a Prime Minister who has dismissed the President to seek ratification of the dismissal from the House in circumstances where a general election follows the dismissal.³³
- 5.33 Such a provision did not form part of the Constitutional Convention's recommendations. It has been included in the legislation to provide for the possibility that the House had been dissolved, thus making it impossible to seek ratification from the House.³⁴
- 5.34 Some witnesses before the Committee felt that rather than excusing the Prime Minister from seeking parliamentary approval of the dismissal, and assuming that the people at a general election would effectively review the dismissal, the House should be recalled to consider the dismissal.³⁵

31 The Hon Malcolm McLelland QC, *Submissions*, p. S627. For a similar view, Mr Michael Stokes, *Submissions*, pp. S643–S644.

32 L.M. Barlin ed, *House of Representatives Practice*, Third Edition Canberra 1997 AGPS, p. 321.

33 Specifically, where within the period of 30 days from the date of the dismissal the House expires or is dissolved; or before the dismissal, the House had expired or been dissolved, but a general election has not occurred.

34 Referendum Taskforce, *Submissions*, p. S94.

35 The Hon Malcolm McLelland QC, *Submissions*, p. S627.

- 5.35 The Committee considers that the provision is appropriate in its present form as it allows the issue to be determined by the Australian people as final adjudicators when they consider how to cast their votes at the ensuing general election.

Alternative dismissal mechanisms

- 5.36 A number of witnesses before the Committee argued for alternative mechanisms for the dismissal of a President, such as:
- a mechanism involving the Senate in approval or disapproval of the dismissal;³⁶
 - a similar procedure for dismissal as that applying to appointment of the President—for example removal by the vote of an absolute majority of the House of Representatives on a motion put by the Prime Minister,³⁷ or by a two-thirds majority of either the House of Representatives alone or of both Houses;³⁸
 - a procedure similar to that which the Constitution presently provides for the removal of High Court judges in s.72—that is, for ‘proved misbehaviour or incapacity’ or some other formula.³⁹
- 5.37 Other witnesses were opposed to such mechanisms.⁴⁰ It was argued such procedures would tip the balance too far in favour of the President. A number of witnesses rejected the suggestion of a procedure similar to that applicable to High Court judges, because such a procedure would open up a dismissal to arbitration by, presumably, the High Court. This in turn
- would create terrible tension within our existing system of government, and the potential for constitutional and political gridlock while the issue of the dismissal of the President is litigated.⁴¹

36 Dr John Uhr, *Submissions*, p.S184; Mr George Williams, *Transcript*, p. 25.

37 Mr George Williams, *Submissions*, p. S224. See also *Transcript*, p. 25; Dr John Hirst, *Transcript*, p. 147.

38 Law Society of New South Wales, *Submissions*, p. S507; Dr John Hirst, *Transcript*, p. 152; Professor Brian Galligan, *Transcript*, p. 198; Senator Jan McLucas, *Transcript*, p. 464.

39 Law Society of New South Wales, *Submissions*, p. S508. See also Mr Harry Evans, *Submissions*, p. S36; Professor George Winterton, *Transcript*, p. 101; Ms Anne Winckel, *Transcript*, p. 157; The Rt Hon Sir Zelman Cowen, *Transcript*, p. 210; Ms Linda Kirk, *Transcript*, p. 253.

40 For example, Dr Baden Teague, *Transcript*, p. 283; Professor Greg Craven, *Transcript*, p. 312.

41 Mr Timothy Stanley, *Transcript*, p. 294.

5.38 The Committee notes that the draft legislation substantially implements the dismissal model recommended by the Constitutional Convention. The Committee is not persuaded that any of the alternative dismissal mechanisms suggested was better than that contained in the Republic Bill. In particular, the Committee considers that the proposed 'quasi-judicial' dismissal procedure, which is appropriate in relation to a judicial officer who must be independent of Parliament, would not be appropriate in respect of the President, who would be part of the executive arm of government. Furthermore, the Committee feels that most of the alternative dismissal mechanisms put forward would probably, in practice, be extremely difficult to satisfy.⁴²

42 The Rt Hon Malcolm Fraser, *Transcript*, p. 216.

